

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.369 OF 2017

Kiran Rameshlal Bhandari,
Age 34 yrs., Occ. Business,
R/o 7, Madan Niwas,
Swarsangam Housing Society,
Priya Nagar, Aurangabad.

... Appellant

... **Versus** ...

Narayan Purushottam Sarada,
Age 44 yrs., Occ. Business,
R/o Mahesh Apartment, B-3,
B-Wing, Prabhat Colony,
Behind Mahesh Auto, Adalat Road,
Aurangabad.

... Respondent

...

Mr. Shyam C. Arora, Advocate for appellant

Mr. Amol Kakade, Advocate h/f Mr. C.D. Fernandes, Advocate for respondent

...

WITH

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... **Respondent**

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Mr. Amol Kakade, Advocate h/f Mr. C.D. Fernandes, Advocate for respondent

...

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 28th SEPTEMBER, 2020

PRONOUNCED ON : 07th DECEMBER, 2020.

JUDGMENT :

1 Both these appeals have been filed by the original complainant challenging judgment and order in Summary Criminal Case No.5638 of 2013 and Summary Criminal Case No.5639 of 2013 decided by learned Judicial Magistrate First Class, Aurangabad (Court No.1) on 20.02.2017; thereby acquitting the accused/ respondent of committing offence punishable under Section 138 of the Negotiable Instruments Act. It will not be out of place to mention here that the case of the complainant was same in both the cases.

The defence of the accused is same. However, since two different Judgments have been given it has resulted in these two separate appeals. But since all the issues are same it is proposed to dispose of both the appeals by this common Judgment.

2 Heard learned Advocate Mr. S.C. Arora for appellant and learned Advocate Mr. Amol Kakade holding for learned Advocate Mr. C.D. Fernandes for respondent in both the appeals.

3 Learned Advocate appearing for the appellant-complainant has vehemently submitted that the complainant had come with a case that he had friendly relations with the accused. Accused was in need of money to purchase immovable property, and therefore, he had requested the complainant to extend amount of Rs.15,00,000/- and Rs.6,00,000/- in respective cases, which was extended by the complainant. In discharge of the said legal enforceable debt or liability two cheques were issued. One was bearing No.442364 dated 25.03.2013 for Rs.15,00,000/- drawn on Nashik Merchants Co-operative Bank Limited, Aurangabad and another was drawn on the same date and same branch bearing No.442365 for Rs.6,00,000/-. After those cheques were deposited by the complainant in his bank, they were dishonoured for the reason "refer to drawer". Thereafter two separate notices were issued by the complainant on 15.06.2013, which were received

by the accused on 18.06.2013. The accused neither replied it nor refunded the amount, and therefore, complainant filed those two separate complaints. After taking into consideration the evidence the learned Magistrate acquitted the accused. Hence, these appeals.

4 It has been further submitted on behalf of the complainant that though the amount was given to the Firm of the accused, yet, the accused had given cheques in order to repay the said legally enforceable debt or liability from his personal account. It was absolutely not necessary that the Firm should have been made party to the proceedings, as the said account, which was maintained, on which the cheque was drawn, was the personal account of the accused. Though in the evidence the accused have denied to receive the notice, yet, the said position was admitted by him in his statement under Section 313 of the Code of Criminal Procedure, and therefore, it was not necessary for the learned Trial Judge to go into the aspects as to whether the statutory notice was received by the accused or not. The defence that has been raised by the accused is, there is a Firm by name "Gangotri Firm". Complainant had given certain amount to said Gangotri Firm, which was in fact, the capital. Wife of the accused is one of the partners of the said Firm. The said Firm had suffered losses, however, the complainant had kept blank cheques in the office of the Firm, which have been then misused by the

complainant. Accused has examined himself as well as witness in defence DW 2 Chandrasen Rajeshirke. The witness states that he was employed with Gangotri Investment Firm. However, the cross-examination of both the witnesses examined by the accused would show that they had failed to prove the existence of such a Firm. When the existence of such a Firm itself is not proved, question of keeping any such blank cheques in the Firm does not arise. There is absolutely no rebuttal of the presumption under Section 139 of the Negotiable Instruments Act and the evidence led by the accused cannot prove the said rebuttal by any stretch of imagination. The learned Trial Judge took evidence of the witnesses in defence as gospel truth. When the basic transaction is proved by the complainant as he had extended the amount to the Firm of the accused by way of cheque, there is no question of proving the said fact in any another manner. It was a legal transaction, and therefore, the initial burden was discharged by the complainant. The learned Trial Judge has unnecessarily gone into the fact that the statement of account of the bank of the complainant does not bear the certificate as the said account extract is electronically generated. He did not consider the provisions under the Bankers' Books Evidence Act, 1891, which does not require such a certificate. When he also failed to notice that there was no question put in cross to the complainant about receipt or voucher not obtained from the accused, yet, the said point abruptly has been considered

by the learned Trial Court in his Judgment. Another fact ought to have been considered that there is attempt to compromise/mediation adopted by the accused vide application Exh.32 in one case and application Exh.33 in another case. That means, it was acceptable to the accused that he owed the amount, and therefore, he wanted to negotiate with the complainant. When all the ingredients of the offence were proved, the learned Trial Judge went wrong in acquitting the accused.

5 The learned Advocate for the complainant has relied on the decision in **Vijay vs. Laxman and another, 2013 STPL (DC) 679 SC**, wherein it has been held that -

“The burden of proving the consideration for dishonour of cheque is on the complainant, but the burden of proving that a cheque had not been issued for discharge of a legally enforceable debt or liability is on the accused. If he fails to discharge the said burden he is liable to be convicted.”

It has been further held in the said decision that -

“When a cheque is issued by a person who has signed on the cheque and the complainant reasonably discharges the burden that the cheque had been issued towards a lawful payment, it is for the accused to discharge the burden under Section 118 and 139 of the Negotiable Instruments Act that the cheque had not been issued towards discharge of a legal debt but was issued by way of security or any other reason on account of some business transaction or was

obtained unlawfully. It is not open for the accused/signatory of the cheque to set up a defence that although the cheque had been signed by him, which had bounced, the same would not constitute an offence.”

5.1 Further reliance has been placed on **Hiten P Dalal vs. Bratindranath Bannerjee, 2001 STPL (DC) 20 SC**, wherein it has been held that -

“Presumption that cheque was drawn for discharge of liability of drawer is presumption of law which is ought to be raised by Court in every case. Burden of proving that there was no debt or liability was on the accused. The presumption has to be rebutted by proof and not by a bare explanation which is merely plausible .

5.2 Further reliance has been placed on the decision of this Court, Bench at Panji in **Shri. Brahmanand T. Mamlekar vs. Shri. Eknath Ashok Tari Volvoikar**, which is almost on the same line.

Relying upon these decisions it was submitted that the learned Trial Judge committed illegality and the Judgment is perverse in view of the legal position, and therefore, the appeal deserves to be allowed. The respondent deserves to be convicted.

6 Per contra, the learned Advocate appearing for the original

accused strongly supported the reasons given by the learned Magistrate. He further submitted that the complainant had failed to prove that there was legal liability. Further, even if we presume that the presumption under Section 139 of the Negotiable Instruments Act was raised in favour of complainant, yet, it has been legally and properly discharged by the accused. The complainant has failed to show, as to why he had given amount of Rs.6,00,000/- in cash. The source of that amount has not been explained by him. Further, when accused has entered into witness box himself as well as he has examined the employee of the Firm Gangotri, which capital was provided by the complainant and which went in loss, then consideration of their testimony cannot be said to be uncalled for. The employee has specifically stated that for some urgent payments, as the said Firm was dealing in shares, accused used to keep his blank cheques in the Firm and then those cheques has been misused. The misuse of the cheques will not prove that those cheques were issued towards legally enforceable debts or liability. The acquittal of the accused is perfectly legal, which does not require any kind of interference by this Court.

7 The learned Advocate for the respondent has relied on the decisions of Hon'ble Supreme Court in **ANSS Rajashekhar vs. Augustus Jeba Ananth** [Criminal Appeal Nos.95-96 of 2019 decided on 18.01.2019],

wherein after considering the ratio laid down in **Rangappa vs. Sri. Mohan, 2010 11 SCC 411** it has been held that the presumption has been rebutted. It has been observed -

“Section 139 of the Act mandates that it shall be presumed, unless the contrary is proved, that the holder of a cheque received it, in discharge, in whole or in part, of a debt, or liability. The expression "unless the contrary is proved" indicates that the presumption under Section 139 of the Act is rebuttable. Terming this as an example of a “reverse onus clause” the three Judge Bench of this Court in Rangappa (supra) held that in determining whether the presumption has been rebutted, the test of proportionality must guide the determination. The standard of proof for rebuttal of the presumption under Section 139 of the Act is guided by a preponderance of probabilities.”

7.1 Further reliance has been placed on the decision in **Baslingappa vs. Mudibasappa** [Criminal Appeal No.636 of 2019 decided by Hon’ble Supreme Court on 9th of April, 2019], wherein also various earlier pronouncements were considered by Hon’ble Supreme Court and it went on to summarize the principles enumerated in cases of Section 118(a) and 139 of the Act, as follows :

- (i) Once the execution of cheque is admitted Section 139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability.

(ii) The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

(iii) To rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

(iv) That it is not necessary for the accused to come in the witness box in support of his defence, Section 139 imposed an evidentiary burden and not a persuasive burden,

(v) It is not necessary for the accused to come in the witness box to support his defence.

7.2 Further reliance has been placed on the decision of this Court in **Vishnu Amthalal Patel vs. The State of Maharashtra; Deepak Wamanrao Balshetwar, 2019 (1) CPMH 114**, wherein this Court went on to analyse the evidence and come to the conclusion that the presumption has been rebutted.

8 At the outset, it will have to be seen, as to whether the complainant has discharged the initial burden to prove that he had advanced loan to the accused. In those catena of Judgments relied by the learned Advocate for the respondent, especially in the case of **Baslingappa** (supra)

when the point, as to whether the complainant is required to discharge his initial burden of proof of legally enforceable debt or liability is concerned, was revisited; as aforesaid in para No.23 of the said Judgment the principles have been summarized. In both the cases the complainant has deposed in support of his respective complaints. In the cross-examination he was found firm in stating that the said amount was given as loan to the accused. It is to be noted that in Summary Criminal Case No.5638/2013, wherein the amount of Rs.15,00,000/- was involved, he has clearly established that, that amount was given from his account by issuing cheque. Now, it is to be noted that the said cheque is stated to have been given on firm by name 'Kapil Kumar and Company'. In order to prove that such account exists he examined CW 2 Sanjay Firke, who was the Branch Manager of Malkapur Urban Co-operative Bank, Station Road, Aurangabad Branch. He has stated that the said Firm by name 'M/s. Kapil Kumar and Company' is holding Current Account No.693 with their branch and the said account was opened by proprietor Narayan Purushottam Sarda. In fact, the account name is "M/s. Kapil Kumar and Company", proprietor Narayan Purushottam Sarda. He has specifically stated that, that account is operated by the accused and he has identified the accused, who was present in the Court as the same person. In the cross-examination, which is totally on a different subject and general in nature, the accused has not been able to prove that no such account exists. Further, it is

also to be noted that the complainant has specifically stated and has produced the documentary evidence in the form of Balance Sheet to state that he has shown the said amount of hand loan to the accused as outstanding. He has also stated that he has given that fact in his Income Tax Returns also for the said year. Taking into consideration all these aspects, it can be definitely held that as regards the amount of Rs.15,00,000/- are concerned, the complainant has discharged the initial burden of proof that he has advanced loan to the accused. This fact can also be further considered that in his statement under Section 313 of the Code of Criminal Procedure accused has not stated that he is not holding such account, on which the cheque was issued by the complainant and he has not specifically stated that he has not received the amount through the said account. Interesting point further to be noted is, that he has examined himself in rebuttal, but his examination-in-chief is very much silent on the point that such Current Account is under his Firm name with the Station Road Branch, Aurangabad of Malkapur Urban Co-operative Bank. When the documentary evidence is produced by the complainant to prove that he had issued the cheque for amount of Rs.15,00,000/- in favour of accused on his the account, then definitely said initial burden has been proved. In other words, the complainant had proved that it was legally enforceable debt or liability, which was to the extent of Rs.15,00,000/- as against the accused.

9 Now, as regards the other disputed cheque i.e. amount of Rs.6,00,000/- is concerned, the complainant has stated that he had given the said amount on 19.05.2011 by cash. In his cross-examination he has stated that he was having that much amount in his bank account. He had the knowledge that as per the Income Tax he could not have given cash more than Rs.30,000/-. But then he says that he has shown the said transaction in his Income Tax Returns. No doubt, he has not produced his Income Tax Returns, but it can be seen that he has shown the said amount as outstanding in his Balance Sheet and the said Balance Sheet has been produced on record and it is the say of the complainant as well as it would have been the regular procedure to produce/attach the Balance Sheet along with the Income Tax Returns. In his statement under Section 313 of the Code of Criminal Procedure the accused has denied to have received such amount from the complainant, but again when he had entered into the witness box, in defence he has absolutely not stated on oath that he had not received such amount. Therefore, in this case also it can be said that the complainant has discharged the initial burden of proof that he had advanced amount of Rs.6,00,000/- as loan to the accused.

10 The accused is not denying that the complainant is a businessman and it is absolutely not challenged that he had capacity to

extend amount of Rs.15,00,000/- and Rs.6,00,000/-, at the relevant time. When complainant had source of income and also the capacity; then that would be an additional factor, that is required to be considered.

11 One more fact that is not disputed is the issuance of statutory notice in both the matters by the complainant to the accused. Both the notices were issued on 15.06.2013 and if we peruse the respective notices, then it can be seen, that they are separately issued, though on the same day. Both the notices were received by the accused on 18.06.2013. When two notices were received, yet the accused kept silence. In his statement under Section 313 of the Code of Criminal Procedure he is accepting the receipt of notice. However, he has not given any reply. In his examination-in-chief accused has come with a defence that after he had received the notice he realized that the cheques have been misplaced, and therefore, he had contacted the complainant and Advocate Sancheti. Learned Magistrate erred in going unnecessarily into the aspect as to whether accused had received the notice or not. When that fact is admitted by accused in his statement under Section 313 of the Code, as well as in his said contentions in chief; then it no longer remains a disputed fact, requiring adjudication by Court. Accused says that he had made inquiry with complainant and Advocate Sancheti. They had assured that they would solve it within 10-15 days. It is his explanation for

not giving any complaint regarding misuse of the cheques. However, at this stage, we will have to consider the fact that though he had received the notices, he has not taken any prompt action. From this angle also we come to the conclusion that the complainant has proved that there was legally enforceable debt or liability towards the accused, in view of the fact that the complainant had advanced loan to him.

12 The accused has come with two fold defences. One is that the cheques have been misused. It is his say that he used to keep certain blank cheques in the office of one Gangotri Firm. According to him, complainant's sister and his wife are friends. Till the Gangotri Firm was carrying on good business the relations between him and the complainant were good. However, after the losses, their relationship became strained. According to him, his wife Shilpa, complainant's sister Reena and one Pallavi Avinash Dodal were the partners in Gangotri Firm. He has further stated that he himself, one Advocate Rahul Sancheti i.e. the brother-in-law of complainant and one Avinash Dodal were looking after the work of the Firm. He had stated that initially the complainant had given certain capital amount to the Firm and it was decided that the amount of the complainant would be refunded from the profit of the Firm. He had given the blank cheques for the miscellaneous expenditure of the Firm. Complainant though after the losses

were suffered by Gangotri firm; that he will not be able to get the capital amount back, and therefore, he had taken the possession of two disputed cheques through Advocate Rahul Sancheti, misused it and then lodged a false complaint. In order to prove this defence he has also examined DW 2 Chandrasen Rajeshirke, who is stated to be the person serving in Gangotri Firm between February, 2011 to February, 2014. The defence witness has in his examination-in-chief supported the say of the accused stating that the accused had kept certain cheques of his personal account in the Firm and they were to be used in the case of urgent payments. He has also stated about some incidents, which appears to have taken place after the notice was received by the accused, however, that cannot be considered, which would have the element of an afterthought action. The testimony of DW 1 Sarda and DW 2 Rajeshirke, though apparently corroborating with each other, cannot be believed at all, for the simple reason that the accused himself was not a partner in the said Firm. Accused has not produced any document on record to show that the Gangotri Firm was registered. In his cross-examination the he has specifically stated that the Firm is registered. But then he accepts that he has not produced any such document, so also, the document showing that his wife was partner in the Firm. He could have examined another witness and asked that person to produce balance-sheet of Gangotri Firm. Another fact, that is required to be noted is, that when there

was an opportunity to the accused to lodge a report for the alleged misuse, he has stated that he did not do so on the assurance given by the complainant and Advocate Sancheti. According to him, they had assured that they would resolve the dispute within 10-15 days. But then there is no answer with the accused to explain as to why he did not take action after the expiry of that 10-15 days. When the statutory notice was already given it was for him to contact an Advocate before allegedly believing the assurance by the complainant and another person. When he is coming with a case that the relations were strained, where is the question of believing words given by the complainant. Another fact is that, his examination-in-chief is totally silent as to when the firm was started and when it ultimately came to an end. The statutory notice was given on 15.06.2013 and according to DW 2 he had served in the same Firm till February, 2014. When the complainant was claiming huge amount of lacs of rupees from the accused, it is hard to believe that the Firm would have been continued after issuance of notice. DW 2 Rajeshirke clearly stated in his cross-examination that no appointment letter was issued to him for working with Gangotri Investment. From the cross-examination of this witness it has come on record that the Gangotri firm was dealing in shares i.e. share broking. If this is to be believed then as regards the share broking transactions are concerned, the concerned Firm should have Demat Account and all the transactions should be through the account

of the Firm. When the accused was not even the partner in the Firm, where was the question of him to undertake any liability for the Firm? When, according to him, there were three partners and also the fact that the husbands of respective partners were looking after the daily transactions then why only one person would take the responsibility upon himself to clear any payments relating to the transaction of the Firm. He has not explained as to why such arrangement was made. He could have produced his account extract to show that such payments were made from his account in respect of transaction of Gangotri Firm. Thus, when possibility has been shown about the existence of documentary evidence and it is not produced for any reason, then oral evidence to that effect can not be allowed. This defence taken by the accused is totally illogical and untrustworthy. The learned Magistrate totally erred in observing that in such cases where huge amount is involved, there ought to have been some supplementary documents. All the necessary documents have been produced by the complainant to show that he had extended such amounts. The cross-examination of the complainant would show that he is admitting the existence of Gangotri Investment, which was dealing in share broking business. He also admits that one Shirke was the Accountant in the said Firm. Even if we consider those admissions as it is, yet that is not sufficient to believe that accused would have taken it upon himself to clear the payments of the Firm by keeping the blank cheques in the

office of the Firm.

13 In this case, the accused is not denying his signature on the disputed cheques. As aforesaid he is coming with a defence, as to how those cheques went into the possession of the complainant, but as aforesaid that defence is unbelievable. Even if for the sake of arguments we admit that the disputed cheques were blank cheques; yet, when accused admits his/her signatures on the disputed cheques, then the legal position on this point is also clear that the complainant would get an authority under Section 20 of Negotiable Instruments Act to complete the incomplete cheque i.e. to write rest of the contents. The legal position on this point has been laid down in **Bir Singh vs Mukesh Kumar decided on 6 February, 2019 [CRIMINAL APPEAL NOS.230-231 OF 2019 (@ SLP(CRL) NOS. 9334-35 OF 2018)**

“37. A meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability. It is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.

38. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other

particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing evidence.

39. It is not the case of the respondent-accused that he either signed the cheque or parted with it under any threat or coercion. Nor is it the case of the respondent-accused that the unfilled signed cheque had been stolen. The existence of a fiduciary relationship between the payee of a cheque and its drawer, would not disentitle the payee to the benefit of the presumption under Section 139 of the Negotiable Instruments Act, in the absence of evidence of exercise of undue influence or coercion. The second question is also answered in the negative.

40. Even a blank cheque leaf, voluntarily signed and handed over by the accused, which is towards some payment, would attract presumption under Section 139 of the Negotiable Instruments Act, in the absence of any cogent evidence to show that the cheque was not issued in discharge of a debt”.

14 From another angle the fact can also be considered. The Balance Sheet of the complainant for the year 2011-12 shows the outstanding amount of Rs.15,00,000/- and Rs.6,00,000/-. According to the complainant, the disputed cheques were given on 25.03.2013. Those cheques were presented by the complainant in the month of June, 2013. Therefore, it is hard to believe that in such a long time the accused could not have seen his own account with Malkapur Urban Co-operative Bank. Strangely now, he is coming with a case that the said account does not belong to him. There is no

reason to disbelieve the testimony of CW 2 Firke, the Bank Manager. When the amount was received in that account in 2011 itself, definitely, the accused would have got the idea from where that amount has come and at that time itself he would have made inquiry with the complainant as to why he had given that amount, if he had not demanded the loan. Accused is a businessman, and therefore, his conduct is then required to be seen, which contemplates that there should be a periodical check of his account with a Bank. He had not stated when he had kept those blank cheques, where it was kept (i.e. place), where he had tried to trace them out prior to receipt of statutory notices etc. On this count also the said defence is unbelievable.

15 When now the position stands that the complainant has discharged the initial burden, accused admits his signature on the disputed cheques; then presumption under Section 139 of the Negotiable Instruments Act definitely gets attracted in favour of the complainant. The said presumption is definitely rebuttable. The evidence, that has been produced in this case in rebuttal as aforesaid, is unbelievable. The ratio laid down in the case of **Vijay** (supra), **ANSS Rajashekar** (supra), **Vishnu Amthalal Patel** (supra) and **Basalingappa** (supra) cannot be denied. However, even after applying those principles, it can be said that the presumption has not been rebutted by the accused. The summary, that has been drawn in

Basalingappa's case is therefore definitely gets attracted in this case and this Court, therefore, comes to the conclusion that the complainant has proved that he had extended loan and in discharge of the said legally enforceable debt or liability the disputed cheques were issued by the accused. Though the cheque of Rs.15,00,000/- was given by complainant on the proprietary firm of the accused, yet accused had issued the disputed cheque from his personal account; therefore, proprietary firm is not a necessary party to the complaint. The complainant was the 'holder of cheques' and therefore, was entitled to present the same for encashment. Both the cheques have been dishonored. The statutory notices issued by the complainant have not been complied with, and therefore, this Court holds that the accused is guilty of committing the offence punishable under Section 138 of the Negotiable Instruments Act. The view taken by the learned Magistrate and thereby acquitting the accused is erroneous and not based on sound legal principles. Hence, interference is required at the hands of this Court.

16 Though the legal principle is that merely because two views are possible, the Appellate Court should not take contrary view; but as aforesaid the learned Magistrate had not scanned the evidence properly with sound legal principles and therefore, interference is required. In other words, this Court is well aware that accused was acquitted by the learned Trial Judge;

and ordinarily the Appellate Court would be cautious while setting aside the said acquittal. In this connection reliance can be placed on the law explained by Hon'ble Supreme Court in **Govindaraju @ Govinda vs. State by Sriramapuram P. S. & Anr. [(2012) 4 SCC 722]** as follows:

“A person is presumed to be innocent till proven guilty and once held to be not guilty of a criminal charge, he enjoys the benefits of such presumption which could be interfered with by the courts only for compelling reasons and not merely because another view was possible on appreciation of evidence. The element of perversity should be traceable in the findings recorded by the Court, either of law or of appreciation of evidence. The Legislature in its wisdom, unlike an appeal by an accused in the case of conviction, introduced the concept of leave to appeal in terms of Section 378 Cr.P.C. This is an indication that appeal from acquittal is placed at a somewhat different footing than a normal appeal. But once leave is granted, then there is hardly any difference between a normal appeal and an appeal against acquittal. The concept of leave to appeal under Section 378 Cr.P.C. has been introduced as an additional stage between the order of acquittal and consideration of the judgment by the appellate Court on merits as in the case of a regular appeal. Sub-section (3) of Section 378 Cr. P. C. clearly provides that no appeal to the High Court under sub-sections (1) or (2) shall be entertained except with the leave of the High Court. This legislative intent of attaching a definite value to the judgment of acquittal cannot be ignored by the Courts. Under the scheme of the Code of Criminal Procedure, acquittal confers rights on an accused that of a free citizen. A benefit that has accrued to an accused by the judgment of acquittal can be

taken away and he can be convicted on appeal, only when the judgment of the trial court is perverse on facts or law. Upon examination of the evidence before it, the Appellate Court should be fully convinced that the findings returned by the trial court are really erroneous and contrary to the settled principles of criminal law. In the case of State of Rajasthan v/s. Shera Ram alias Vishnu Dutta [(2012) 1 SCC 602], a Bench of this Court, of which one of us (Swatanter Kumar, J.) was a member, took the view that there may be no grave distinction between an appeal against acquittal and an appeal against conviction but the Court has to keep in mind the value of the presumption of innocence in favour of the accused duly endorsed by order of the Court, while the Court exercises its appellate jurisdiction. In this very case, the Court also examined various judgments of this Court dealing with the principles which may guide the exercise of jurisdiction by the Appellate Court in an appeal against a judgment of acquittal. We may usefully refer to the following paragraphs of that judgment:

"8. The penal laws in India are primarily based upon certain fundamental procedural values, which are right to fair trial and presumption of innocence. A person is presumed to be innocent till proven guilty and once held to be not guilty of a criminal charge, he enjoys the benefit of such presumption which could be interfered with only for valid and proper reasons. An appeal against acquittal has always been differentiated from a normal appeal against conviction. Wherever there is perversity of facts and/or law appearing in the judgment, the appellate court would be within its jurisdiction to interfere with the judgment of acquittal, but otherwise such interference is not called for".

It has been further observed that -

“When an accused is acquitted of a criminal charge, a right vests in him to be a free citizen and this Court is very cautious in taking away that right. The presumption of innocence of the accused is further strengthened by the fact of acquittal of the accused under our criminal jurisprudence. The courts have held that if two views are possible on the evidence adduced in the case, then the one favourable to the accused, may be adopted by the court. However, this principle must be applied keeping in view the facts and circumstances of a case and the thumb rule is that whether the prosecution has proved its case beyond reasonable doubt. If the prosecution has succeeded in discharging its onus, and the error in appreciation of evidence is apparent on the face of the record then the court can interfere in the judgment of acquittal to ensure that the ends of justice are met. This is the linchpin around which the administration of criminal justice revolves”.

Further, while taking note of powers of the Appellate Court are concerned, it has been observed that -

“The law is well-settled that an appeal against an order of acquittal is also an appeal under the Code of Criminal Procedure, 1973 and an appellate Court has every power to re-appreciate, review and reconsider the evidence before it, as a whole. It is no doubt true that there is presumption of innocence in favour of the accused and that presumption is reinforced by an order of acquittal recorded by the trial Court. But that is the end of the matter. It is for the Appellate Court to keep in view the relevant principles of law to re-appreciate and reweigh the evidence as a whole and to come to its own conclusion on such evidence, in consonance with the principles of criminal jurisprudence”.

16.1 In one of the recent pronouncement in **Anwar Ali and another vs. The State of Himachal Pradesh [Criminal Appeal No. 1121 of 2016]** decided on **25.09.2020**; the Three Judge Bench of Hon'ble Supreme Court has reiterated the same principles. Note of catena of earlier pronouncements was taken as follows:

“5.2 Before considering the appeal on merits, the law on the appeal against acquittal and the scope and ambit of Section 378 Cr.P.C. and the interference by the High Court in an appeal against acquittal is required to be considered.

5.2.1 In the case of Babu (supra), this Court had reiterated the principles to be followed in an appeal against acquittal under Section 378 Cr.P.C. In paragraphs 12 to 19, it is observed and held as under:

12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject-matter of scrutiny by the appellate court. (Vide Balak Ram v. State of U.P (1975) 3 SCC 219, Shambhoo Missir v. State of Bihar (1990) 4 SCC 17, Shailendra Pratap v/ State of U. P. (2003) 1 SCC 761, Narendra Singh v.

State of M. P. (2004) 10 SCC 699, Budh Singh v. State of U. P. (2006) 9 SCC 731, State of U.P. v. Ram Veer Singh (2007) 13 SCC 102, S. Rama Krishna v. S. RamiReddy (2008) 5 SCC 535, Arulvelu v. State (2009) 10 SCC 206, Perla Somasekhara Reddy v. State of A.P (2009) 16 SCC 98 and Ram Singh v. State of H.P (2010) 2 SCC 445)

15. In Chandrappa v. State of Karnataka (2007) 4 SCC 415, this Court reiterated the legal position as under: (SCC p. 432, para 42)“(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded. (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law. (3) Various expressions, such as, ‘substantial and compelling reasons’, ‘good and sufficient grounds’, ‘very strong circumstances’, ‘distorted conclusions’, ‘glaring mistakes’, etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of ‘flourishes of language’ to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion 4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of Law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.(5) If two reasonable

conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

16. In *Ghurey Lal v. State of U.P* (2008) 10 SCC 450, this Court reiterated the said view, observing that the appellate court in dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court’s acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court had the distinct advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

17. In *State of Rajasthan v. Naresh* (2009) 9 SCC 368, the Court again examined the earlier judgments of this Court and laid down that:

“20. ... an order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused.”

18. In *State of U.P v. Banne* (2009) 4 SCC 271, this Court gave certain illustrative circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court. The circumstances include:

“(i) The High Court’s decision is based on totally erroneous view of law by ignoring the settled legal position;

(ii) The High Court’s conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence

was patently illegal leading to grave miscarriage of justice;

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) This Court must always give proper weight and consideration to the findings of the High Court;

(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal." A similar view has been reiterated by this Court in *Dhanapal v. State* (2009) 10 SCC 401.

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference." (emphasis supplied)

Therefore, after taking note of the said ratio laid down in those catena of judgments, this Court has every power to re-appreciate, review and reconsider the evidence. After re-appreciating the evidence as above, the conclusion has been drawn that the judgment of acquittal rendered by the learned Trial Court is perverse, deserves to be set aside.

17 Now, when this Court has held respondent/ accused guilty of

committing offence punishable under Section 138 of NI Act, the further act would ensue regarding imposition of quantum of punishment. It is clear from the aims and object for the enactment of Negotiable Instruments Act, that the penal provision was introduced to enhance the acceptability of cheque in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangements made by the drawer. Honest drawers' interest who issue cheques is safeguarded in the Act itself.

17.1 In **Dalmia Cement (Bharat) Ltd vs. Galaxy Traders & Agencies Ltd.** reported in **(2001) 6 SCC 463**, the Hon'ble Supreme Court has explained the scope of offence under Section 138 of the Act as under: .

"3.The Act was enacted and Section 138 incorporated with a specified object of making a special provision by incorporating a strict liability so far as the cheque, a negotiable instrument, is concerned. The law relating to negotiable instruments is the law of commercial world legislated to facilitate the activities in trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be convertible into money and easily passable from one person to another. In the absence of such instruments, including a cheque, the trade and commerce activities, in the present day world, are likely to be adversely affected as it is impracticable for the trading community to carry on with it the bulk of the currency in force. The negotiable instruments are in fact the instruments of credit being convertible on account of legality of being negotiated and are easily

passable from one hand to another. To achieve the objectives of the Act, the legislature has, in its wisdom, thought it proper to make such provisions in the Act for conferring such privileges to the mercantile instruments contemplated under it and provide special penalties and procedure in case the obligations under the instruments are not discharged. The laws relating to the Act are, therefore, required to be interpreted in the light of the objects intended to be achieved by it despite there being deviations from the general law and the procedure provided for the redressal of the grievances to the litigants. Efforts to defeat the objectives of law by resorting to innovative measures and methods are to be discouraged, lest it may affect the commercial and mercantile activities in a smooth and healthy manner, ultimately affecting the economy of the country.

4. Section 138 of the Act makes a civil transaction to be an offence by fiction of law. Whereby any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person is returned by the bank unpaid either because of the amount or money standing to the credit of that person being insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account, such person, subject to the other conditions, shall be deemed to have committed an offence under the Section and be punished for a term which may extend to one year or with fine which may extend to twice the amount of cheque or with both. To make the dishonor of the cheque as an offence, the aggrieved party is required to present the cheque to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier and the payee or the holder in due course of the cheque makes a demand for payment of the cheque amount by giving a notice in writing to the

drawer of the cheque within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid and drawer of such cheque fails to make the payment of the amount within 15 days of the receipt of the said notice. Section 139 refers to presumption that unless the contrary is proved, the holder received the cheque of the nature referred to under Section 138 for the discharge in whole or in part or of any debt or other liability. Section 140 restricts the defence in any prosecution under Section 138 of the Act and Section 141 refers to such offence committed by the companies. Section 142 provides that, notwithstanding anything contained in the code of Criminal Procedure, no court shall take cognizance of an offence under the section except upon a complaint in writing made by the payee or, as the case may be, the holder of the cheque and that such complaint is made within one month of the date on which the cause of action arose under clause (c) of proviso to Section 138 of the Act."

17.2 Further, in **Kaushalya Devi Massand vs. Roopkishore Khore** reported in **(2011) 3 SCR 879**; Hon'ble Supreme Court while dealing with a matter regarding quantum of sentence for the offence under Section 138 of the NI Act, observed as under:

"9. Having considered the submissions made on behalf of the parties, we are of the view that the gravity of a complaint under the Negotiable Instruments Act cannot be equated with an offence under the provisions of the Indian Penal Code or other criminal offences. An offence under Section 138 of the Negotiable Instruments Act, 1881, is almost in the

nature of a civil wrong which has been given criminal overtones. The learned Magistrate, in his wisdom was of the view that imposition of a fine payable as compensation to the Appellant was sufficient to meet the ends of justice in the instant case. Except having regard to the submission made that the Appellant/complainant, is a widowed lady of advanced age, there is no other special circumstance which calls for interference with the order of the learned Magistrate, as confirmed by the High Court, with an increased fine."

18 In **R Vijayan vs. Baby and another** reported in (2012) 1 SCC 260 Hon'ble Supreme Court held that while awarding compensation in matters under Section 138 of the Negotiable Instruments Act, interest can be awarded @ 9% per annum.

19 Taking into consideration the above legal position, awarding jail sentence now to the respondent/accused may not be in the interest of justice. Here, the appellant would also be interested in getting his amount back. Therefore, payment of compensation under Section 357 of Code of Criminal Procedure to the complainant would be in the interest of justice. The punishment that can be awarded for an offence under Section 138 of Negotiable Instruments Act is “imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or both” (stress supplied by me). The next step would be what could be the

amount of fine.

20 Here, the cheques Exh.16 and 17 were drawn for Rs.15,00,000/- and Rs.6,00,000/- respectively. The complaint was filed in 2013 after the statutory notice. The amount became due to complainant after the date of notice. Accused has utilized the said amount till today. Therefore, some amount needs to be given to complainant above the cheque amount towards interest. The rate of interest in banks has gone down nowadays, and therefore, the said rate cannot be equal to the rate granted in **R. Vijayan's** case. Hence, after taking into consideration all the above pronouncements it would be in the interest of both the parties to impose fine of Rs.18,00,000/- and Rs.8,00,000/- in respective cases and to direct the amount of Rs.17,50,000/- and Rs.7,50,000/- to be paid to complainant as compensation under Section 357(1) of the Code of Criminal Procedure. Time will have to be granted to the accused to deposit the said amount; however, with a rider that the said time will not be extended. Learned Magistrate who would be responsible for the execution of sentence that would be imposed by this Court, will not have any authority to extend the said period.

21 For the aforesaid reasons, as the learned Magistrate has erred in acquitting the respondent/accused; the impugned judgments need to set aside. Appeals deserve to be allowed. Hence following order.

ORDER

1 Both the appeals stand allowed.

2 The Judgments and order passed in Summary Criminal Case No. 5639 of 2013 and Summary Criminal Case No.5638 of 2013 by learned Judicial Magistrate First Class (Court No.1), Aurangabad on 20.02.2017; acquitting the respondent/accused Narayan Purushottam Sarda are hereby set aside.

3 Respondent/accused Narayan Purushottam Sarda is hereby convicted for the offence punishable under Section 138 of Negotiable Instruments Act.

4 Respondent/accused is hereby sentenced to pay fine of Rs.18,00,000/- (Rupees Eighteen Lacs) and Rs.8,00,000/- (Rupees Eight Lacs) respectively for the two cases. The said amount be deposited by respondent before learned Trial Court on or before 1st of February, 2021. In case of failure on the part of the accused to deposit the said amount within the aforesaid period, he should undergo simple imprisonment of three months, in each case.

5 It is clarified that the said period for deposit of time will not be extended on any ground. Learned Magistrate has no authority to extend the

said period for deposit of fine amount.

6 After the amount of fine is deposited in the Trial Court, amount of Rs.17,50,000/- (Rupees Seventeen Lacs Fifty Thousand only) and Rs.7,50,000/- (Rupees Seven Lacs Fifty Thousand only) respectively be given to complainant Kiran Rameshlal Bhandari under Section 357 (1) of Code of Criminal Procedure.

7 Rest of the amount be credited to Government.

8 Respondent to surrender bail bounds on above condition to deposit the amount of fine within period given.

(Smt. Vibha Kankanwadi, J.)

agd